Supreme Court, U. S.
FILED
SEP 18 1980
MICHAEL RODAK, JR., CLERK

No. 80-285

Supreme Court of the United States

October Term, 1980

JERRY F. CHVOSTA,
Petitioner,

vs.

ALISON PIERRE AND JACK BAZIE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS, EIGHTH APPELLATE DISTRICT CUYAHOGA COUNTY, OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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PRELIMINARY STATEMENT

It should be obvious from a cursory reading of Petitioner's Brief that there are absolutely no constitutional issues involved in this case. This is simply a case of ordinary common law negligence. For that reason alone, this Petition should be denied.

The jury in this case returned a verdict awarding both compensatory and punitive damages against Petitioner for conduct which any reasonable person would consider barbaric and outrageous. The evidence in support of this

verdict and the various rulings of the Trial Court are so clear and beyond reasonable doubt that a concise synopsis of the evidence in this Record will, we believe, sufficiently answer the points raised in Petitioner's Brief.

The Court will note that the Petitioner appears in this Court without counsel, although he was represented by experienced, competent trial counsel throughout the trial of this case. His Memorandum is so factually inaccurate as to warrant the appellation of being outrageous in its misstatements of events, testimony, statements, purported exhibits and documents that a point by point reference to these unsupported allegations could further the Petitioner's obfuscating tactics.

Accordingly, counsel for Respondent hereby states professionally that the following is an accurate synopsis of the evidence in this case.

COUNTER STATEMENT OF THE CASE

On June 21, 1976, Petitioner suddenly and without any warning whatsoever discharged a 16 gauge shotgun blast into the face and upper body of Alison Pierre—a 14 year old girl who was walking on the sidewalk *one house west* of Petitioner's property. Petitioner fired the shotgun from his front lawn, a distance of almost 70 feet. This attack with a deadly weapon was malicious and unwarranted.

Petitioner's conviction of two counts of Felonious Assault was previously upheld by the Ohio Supreme Court. On June 26, 1980, he was indefinitely suspended from the practice of law by the Ohio Supreme Court. This action went to trial on three separate and distinct claims for relief, to-wit:

(1) Negligence;

(2) Willful and wanton misconduct in reckless disregard of Appellee's rights and safety, and

(3) Assault and battery.

At the close of all the evidence, the Trial Court sustained Respondent's Motion for a Directed Verdict on the issues of negligence and assault and battery and submitted to the jury the issues of compensatory and punitive damages. The jury found for Respondent on both issues.

COUNTER STATEMENT OF FACTS

During the five year period immediately preceding the incident in question, Petitioner experienced a few unrelated incidents of what he terms "harassment" from neighborhood children. These were incidents such as *boys* stealing apples from his apple tree; two years later he discovered three eggs thrown against his house; once in 1975, a neighborhood *boy* let his dog do his "business" on his front lawn; in May of 1976, some neighborhood *boys* were calling him names while he was cutting a tree stump from his front yard. On each of these four instances, Petitioner called the Shaker Heights Police Department and reported the *boys*.

On the evening of June 21, 1976, a group of junior high and high school *girls,* perhaps twelve in number, had a club meeting at the home of Sheila Solomon (around the corner and perhaps two blocks from Petitioner's home). After some refreshments and dancing, the meeting broke up at approximately 9:00 p.m.

Monica Hardy, age 16, lived at 16701 Lomond Boulevard, two houses east of the property of Petitioner. She was at the club meeting and asked Sheila Solomon, her

sister, Pam, and her Aunt, Sandra Williams, to walk her home.

These four girls left the Solomon home, walked north on Linholm to the intersection of Lomond, turned the corner to the right, going east and proceeded to cross the street onto the sidewalk toward the Hardy residence.

Somewhere on the sidewalk in front of the Petitioner's home, they encountered the Petitioner. There was an exchange of words, some arguing about the girls walking on his tree lawn, but certainly no physical violence of any nature.

Mrs. Newbill, the Aunt of Monica Hardy, was in her upstairs bedroom, heard the commotion on the sidewalk out front, came downstairs, opened the door and told Monica to come inside. She also told the other girls to go home. At that point, the remaining three girls turned and headed back toward Linholm, or west on Lomond. The Petitioner followed them for a few steps and then turned and walked across his yard toward his house. Before he disappeared from view, *he turned and yelled* "I am going to kill someone tonight!"

Appellant then went back to his garage and got his 16 gauge shotgun, and from the glove compartment of his automobile, obtained at least three shells. He then headed toward the front of his property, and while walking, inserted one shell into the chamber of the shotgun and loaded it. (This was a single shot, hammer-action shotgun.) He then walked down his driveway toward the street to a large, tall pine tree in his front yard, stepped into the pine tree, turned to his right and aimed the gun in the direction of a group of girls who were at least one property away from him, on the sidewalk in front of the property just west of his house.

Petitioner fired one round into the group of girls, *immediately reloaded* his gun but continued to hide in the tree. He did not come out from the pine tree until the police arrived and ordered him to.

At the time the club meeting broke up, Angela Gray, Paula Cox and Respondent, Alison Pierre, left together. They proceeded to the home of Angela Gray, stayed there for a few minutes, and decided to go back to the Solomon home because Angela had forgotten something. They left the Solomon home and proceeded toward the corner of Linholm and Lomond, with the intention of going to Monica Hardy's house to ask her if she would walk with them to the Baskin Robbins Ice Cream Store. When they got to the intersection of Lomond and Linholm, they met Sheila Solomon, Pamela Solomon and Sandra Williams. A brief discussion was had by all at the corner and shortly they all turned and headed east on the north side of Lomond Boulevard, toward the Hardy home. It was at this time that the shot was fired, striking both the Appellee and Angela Gray.

With the exception of Monica Hardy, none of the girls mentioned, including the Respondent, either knew the Petitioner or had ever seen him before this particular evening. In addition, the *Respondent never did see the Petitioner* nor knew who he was until she testified during his criminal trial.

At the moment Respondent was struck by this shotgun blast, she was 67 feet 7 inches from the place where Petitioner was hiding in the tree.

There was no evidence whatsoever that anyone, with the exception of Petitioner, had any type of firearm or other dangerous weapon either visible or on their person at any time that evening.

Immediately before the shooting, as he came into view from the back of his property, Petitioner turned abruptly to his left, pointed the shotgun at Mrs. Newbill and Monica Hardy and said "I am going to kill someone tonight". They immediately ducked back into their house and the next thing they heard was a shotgun blast. Immediately after the shotgun blast, when Monica Hardy again looked out of her front door, the Petitioner turned again and pointed the gun toward her, but said nothing.

Two members of the Shaker Heights Police Department, who were immediately involved in apprehending the Petitioner, testified that, after they had given him his rights, and while in the cruiser on the way to the Shaker Heights Police Station, he stated "the children had been bothering him for months and *I had to get even with them*".

Respondent was 14 years of age at the time of this incident. She received almost the full impact of this blast. She had a multitude of penetrating wounds of the scalp, face, neck, shoulders, chest and abdomen. She was hospitalized twice and underwent surgery on two separate occasions. Her plastic surgeon, Dr. deWayne Richey, testified that as of the time of the trial, she had over 100 shotgun pellets imbedded in her body and that they were there permanently. He further testified as to the multitude of permanent disfiguring scars about her face, neck and chest. This young girl never knew what hit her or why it hit her. She was a totally innocent and unsuspecting pedestrian and will live with the effects of this mutilation for the rest of her life.

ARGUMENT

In a case of negligence and assault and battery, where defendant testifies that he wanted to fire a warning shot into his neighbor's lawn, that "I didn't want to hurt them", but "as I swung around it discharged accidentally", such testimony is entirely inconsistent and irreconcilable with the right of self-defense.

Petitioner, in his answer filed herein, set forth the affirmative defense of self-defense. However, during trial he testified on both direct and cross-examination that the gun discharged "accidentally". The following is taken directly from the Record herein:

> ". . . I wanted to fire a warning shot into the neighbor's lawn to let them know that I was armed because I didn't want to hurt them. So, as I swung the gun around, it discharged accidentally."
>
> ". . . I realized what had happened and I was so shocked at the fact that the gun had gone off. . ."

It has long been the settled law of Ohio that self-defense and accident are inconsistent defenses. In *State v. Champion,* 109 Ohio St. 281 (1924), this Court held, beginning at page 286, that:

> "The very fact that requests were asked both on accidental homicide and self-defense, under the same evidence, presents a most peculiar paradox—a direct contradiction in terms and truth. Self-defense presumes intentional willful use of force to repel force or escape force. Accidental force or shooting is exactly the contrary, wholly unintentional and unwillful. . ."

> "If the evidence warrants, the defendant has a right to one request or the other. By no manner of logic, law or legerdemain is he entitled to both."

When Petitioner *abandoned* the defense of self-defense and testified at trial that the shooting was accidental, that he did not intend to shoot at the girls, and that the gun went off accidentally, he cannot now complain that the Trial Court took the issue of self-defense from the jury.

CONCLUSION

The Ohio Court of Appeals held at page 11 of its Opinion:

> "We have carefully reviewed the Record in the instant case and conclude that the Trial Court properly directed a verdict for Appellee as to the issue of liability. The Record *conclusively* demonstrates that Appellant assaulted Appellee and was guilty of negligence and that the assault and negligence were the proximate cause of Appellee's injuries. . ."

Petitioner was represented in the trial of this case by competent, outstanding trial counsel. The verdict reflects their outstanding job, particularly in view of the nature and extent of Respondent's injuries and the permanent disfigurement of her mind and body. The Opinion of the Court of Appeals was unanimous. There is no error in this Record whatsoever. There are certainly no constitutional issues involved.

For these reasons, we respectfully submit that the Petition for Writ of Certiorari be dismissed.

Respectfully submitted,

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